IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 925 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHURAJI GOVINDSINH ZALA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MA BUKHARI for the appellant.
MR HM PRACHCHHAK, APP, for the respondent-State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 26/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be convicted by learned Additional Sessions Judge, Ahmedabad (Rural), for offence of murder of Abhesinh Kesarisinh and also came to be sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- and, in default, to undergo rigorous imprisonment for six months by judgment and order dated 30th July, 1997, rendered in Sessions Case No.157 of 1994.

2. The incident occurred on 12th April, 1994, at about 8.30 A.M., in village Sitapur of Viramgam Taluka of Ahmedabad District. The deceased-Abhesinh Kesarisinh left his home and was passing by the house of the accused-appellant, who happens to be the nephew of the deceased. The appellant rushed with a Dharia in his hand towards deceased-Abhesinh and inflicted a blow on head of the deceased which, ultimately, resulted into his death. On the blow being inflicted, the deceased fell down on the ground. The incident was noticed by two sons of the deceased, who were following the deceased. They, immediately, shifted him to the house of one Govindsinh and, thereafter, summoned a Matador and shifted him

to the hospital at Bechraji, where he was declared dead. Police was informed and an F.I.R. was registered. On investigation, police found sufficient material against the appellant and, therefore, filed charge sheet in the Court of learned Judicial Magistrate, First Class, at Viramgam. Since the offence alleged against the appellant was triable exclusively by a Court of Sessions, the case was committed to the Sessions Court, Ahmedabad (Rural). Upon the case becoming ripe for hearing, charge was framed at Ex.8. The appellant pleaded not guilty to the charge and came to be tried.

2.1 After considering the evidence led by the prosecution, learned Additional Sessions Judge came to a conclusion that the prosecution was successful in establishing the charge for offence of murder and recorded conviction therefor and passed the sentence as stated above. However, the learned Additional Sessions Judge found that the prosecution was not successful in establishing the offence punishable under Section 135 of the Bombay Police Act and recorded acquittal therefor. Aggrieved by the judgment and order of conviction and sentence, original accused has preferred this appeal.

3. We have heard learned Advocate, Mr. Bukhari, for the appellant and learned Additional Public Prosecutor, Mr. Prachchhak, for the respondent-State.

4. Learned Advocate, Mr. Bukhari, after taking us through the record and proceedings, submitted that the Trial Court committed an error in accepting the evidence of eye-witnesses and neglecting the contentions raised by the defence. Mr. Bukhari submitted that, though the sons claimed to have witnessed the incident, they have not chosen to intervene or rescue the father. Their conduct is unnatural. Added to this is the fact that, though these witnesses claimed to have shifted the deceased from the place of incident to the house of Govindsinh and though they claimed that the deceased was bleeding profusely, clothes of neither of them were stained with blood. This adds to the doubt about the witnesses being eye-witnesses to the incident. Mr. Bukhari submitted that the investigation was not properly carried out. He submitted that no Panchnama was drawn at the house of Govindsinh, where, the witnesses claimed that, the deceased was

taken and rested till the Matador arrived and also claimed that the flooring in the house was stained with blood of the deceased. He submitted that the Investigating Officer has not drawn any Panchnama in respect of the Matador either, where also the witnesses claimed that the deceased had profusely bled. The entire prosecution case, therefore, becomes doubtful and benefit of this reasonable doubt ought to have been given to the accused by the Trial Court. Mr. Bukhari submitted that this Court may exercise its appellate powers, set aside the judgment and order of the Trial Court and acquit the accused-appellant by giving him the benefit of reasonable doubt.

4.1 Alternatively, it is canvassed by learned Advocate, Mr. Bukhari, that here is a case of single blow allegedly given by the appellant to the deceased and, therefore, benefit of exception 1 or 4 of Section 300 of I.P.C. may be given to the appellant. The appellant is in jail since 1994 and, therefore, the conviction may be recorded for an offence of lesser gravity and appropriate sentence may be passed.

5. Learned Additional Public Prosecutor, Mr. Prachchhak, has opposed this appeal. According to Mr. Prachchhak, the witnesses cannot be disbelieved only because they have not reacted in a particular manner. Mr. Prachchhak submitted that this is not a case where the incident had lasted for a longer time. This is a case of single blow and the witnesses, even if they intended to do so, could not have done that for the reason that the appellant rushed out of his house and gave blow on the head of the deceased with a Dharia. There was no opportunity for the witnesses to make an attempt to rescue the deceased. Mr. Prachchhak submitted that the clothes of the witnessess were not stained with blood, but that by itself is not sufficient to doubt the deposition of the witnesses when their presence is otherwise natural and they have stood the test of cross-examination. He submitted that, it would depend on how the witnesses shifted the deceased from the place of incident to the house of Govindsinh and further. Blood is found at the place of incident and, therefore, not finding blood stains on clothes of the witnesses by itself will not render their depositions unbelievable. Mr. Prachchhak, therefore, submitted that the contention regarding the depositions of the eye-witnesses being unbelievable may not be

accepted.

5.1 As regards the alternative plea of the case falling within exception 1 or 4 of Section 300 of I.P.C., learned Additional Public Prosecutor, Mr. Prachchhak, submitted that though this is a case of single blow, it would not fall within any of the two exceptions for the reason that there is no material emerging from the record to show that the other requirements of those exceptions are fulfilled. The blow is given with a Dharia on head, which is a vital part of the body and the injury has resulted into the death of the deceased and the doctor has opined that the injury was sufficient to cause death in the ordinary course of nature and, therefore, the second contention may not be accepted.

6. We have given a thoughtful consideration to the contentions raised by both the sides. We have scrutinized the record and proceedings and have examined the same from the angles suggested by the learned advocate for the appellant. We have also gone through the judgment and order impugned herein.

7. Dr. Bhargav Becharbhai Jhaveri has been examined at Exh.28. This witness had performed postmortem of the dead body of Abhesinh Kesarisinh. He says that he noticed an incise wound on the perieto occipital region towards right side, which was oblique admeasuring 8 cm. X 1.5 cm. going bone deep. The said injury was ante-mortem. The doctor also says that he noticed a haematoma of a diameter of about 10 cm. on the perieto-occipital region . He says that, he noticed linear fracture of the left perietal, right preietal and the occipital bone, which were of “Y” shape admeasuring 12 cm. and 4 cm. There was contusion on right and left perietal area and occipital area of brain and there was haemorrhage on the brain tissues. The doctor opines that the injury was possible with muddamal article No.6-Dharia and that the injury was sufficient in the ordinary course of nature to cause death. The doctor is cross-examined at length, but nothing emerges therefrom to render the deposition either doubtful or unbelievable.

8. The prosecution has examined Kirtisinh Abhesinh Zala, at Exh.31 and his brother, Prakashsinh Abhesinh Zala, at Exh.33.

These two witnesses are sons of the deceased, who claim to have seen the incident. Kirtisinh has lodged the First Information Report, which is at Exh.32.

8.1 These witnesses say that the incident occurred at about 8.30 A.M. Both these witnesses say that, they both and their father, Abhesinh, were going to their stable. The incident occurred in front of the house of Bhuraji Govindsinh, i.e. the appellant-accused. These witnesses say that when their father was passing by the house of the appellant-accused, the appellant-accused suddenly rushed with a Dharia in his hand towards their father and inflicted a Dharia blow on the head of their father. The witnesses say that they, therefore, immediately rushed towards their father and the appellant-accused went to his house with the Dharia. Because of the shouts raised by these two witnesses, Jashuji Vajesinh and Jilubha Govindsinh also rushed to the place of incident. They all shifted the deceased to the house of Govindsinh and called a doctor. Dr. Shantilal arrived and gave tetanus injection to the deceased and referred him to Bechraji Hospital for further treatment. They took the deceased to Bechraji Hospital in a

Matador, where he was declared dead. Bechraji Police arrived and Kirtisinh lodged the F.I.R.

8.2 The witnesses have been cross-examined at length. They admit that the deceased was bleeding profusely. He was taken by these two witnesses and Jashuji Vajesinh and Natuji Bhimaji. They also admit that their clothes were not stained with blood. First informant-Kirtisinh says that he had shown the place of incident to the police. He says that he did not take the police to the house of Govindsinh. Kirtisinh also admits that he had not talked to Dr. Shantilal about the incident. He denies the suggestion that the accused is falsely implicated.

8.3 The explanation as to why the clothes were not stained with blood comes in deposition of Prakashsinh. During cross, he says that they had lifted the deceased with hands and, therefore, their clothes were not stained with blood. He says that, he does not know whether clothes of other witnesses were stained with blood or not.

8.4 The evidence of these two eye-witnesses is supported by evidence of Jashuji Vajesinh, at Exh.34. He says that, at the time of the incident, he was going from his field to his house. He saw Abhesinh, Pankajkumar and Kirtisinh coming from opposite direction. At that time, Bhurasinh, the appellant-accused, came out of his house and inflicted a Dharia blow on the head of Abhesinh and he, therefore, rushed there. Abhesinh was bleeding profusely and fell down. They, therefore, lifted him and took him to the house of Govindsinh. This witness is also cross-examined at length and nothing emerges therefrom to render his deposition doubtful.

9. It is found that the accused had produced the weapon at the time of his arrest. A Panchnama was drawn and the Dharia was not found to contain any blood stains.

10. From the above evidence, what we find is that the deceased started off for his stable, followed by his two sons. It emerges from their deposition that they were lagging behind by a few feet. When the deceased was passing by the house of the appellant, the appellant-accused rushed from his house and

inflicted a blow. Though it has come in evidence that the dispute between the parties is going on for quite a long time, at the time of the incident, there was no quarrel, no dispute, no exchange of words and no scuffle, and there was no reason for the appellant to have rushed to the deceased and inflicted the fatal blow. The blow has caused the death. The injury was found to be sufficient in ordinary course of nature to cause death and, therefore, it could be said that the death of the deceased is proved to be homicidal. The witnesses are natural and there is no reason to disbelieve them. They clearly implicate the appellant-accused and, therefore, involvement of the appellant-accused in the incident has rightly been accepted by the Trial Court to have been proved by the prosecution.

11. There is no reason to disbelieve the eye-witnesses on the ground of their alleged unnatural conduct. We do not find any unnatural conduct on the part of the eye-witnesses. It is not that they have not rescued the deceased but the rescue was after the blow was inflicted. The manner in which the incident occurred left no room for the eye-witnesses to intervene or rescue the deceased

prior to the appellant giving the blow. Subsequent to the appellant giving the blow, they have rushed and rescued the deceased. It cannot be said that the conduct of the eye-witnesses is unnatural. Certain contentions regarding the witnesses have not stated that their father started earlier and then they followed their father are of no significance when the witnesses say that they were lagging behind by few feet. The witnesses are rustic villagers, which is also a factor that cannot be overlooked and such a hyper technical approach in appreciating the evidence cannot be adopted in such a situation. As a result, the depositions of these witnesses have to be accepted which support the prosecution case.

12. The only question that, now, remains to be considered and decided by us is the alternative submission of learned Advocate, Mr. Bukhari, about the case falling under exception 1 or 4 of Section 300 of I.P.C. As discussed above, what we have noticed is that the incident occurred when the deceased was going towards his stable when, all of a sudden, the appellant-accused rushed out of his house with a Dharia in his hand and inflicted the blow. There was no chance for any provocation in proximity of

time or place of the incident by the deceased to the appellant and, therefore, the case cannot be fall under exception 1 to Section 300 because the requirement is that the there must be a situation where the accused is deprived of the power of his self-control because of grave and sudden provocation. None of these ingredients is present to bring the case under exception 1 to Section 300 of I. P. C.

12.1 Similarly, it cannot be said that the incident occurred without premeditation, in a sudden fight, in heat of passion or upon the sudden quarrel. Here, there was no fight leave aside a sudden fight. There was no quarrel either in proximity of time and place of incident and it cannot be said that the incident occurred without premeditation when the appellant-accused rushed out of his house with a Dharia in his hand and inflicted a blow on the head of Abhesinh with such a force that had resulted into his death ultimately. The incident, therefore, is the outcome of a premeditated offence. The deceased was passing by a public street not anticipating any such assault when the appellant rushed out of his house and inflicted the blow with a Dharia. It cannot be said that the appellant has not taken undue advantage of the situation

nor can it be said that he has acted in an unusual manner. The case, therefore, cannot fall under exception 4 to Section 300 of I.P.C.

13. We, therefore, find that none of the contentions raised by learned Advocate, Mr. Bukhari, can be accepted. The Trial Court was justified in recording conviction and awarding the sentence, which is minimal prescribed by law. We do not find any reason to interfere with the conviction and/or sentence. The appeal has, therefore, to fail and is dismissed.

[A. L. DAVE, J.]

[S. R. BRAHMBHATT, J.]

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